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No. 03-445

Supreme Court, U.S.
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In the Supreme Court of the United States

JOSE LUIS PERDOMO PADILLA, *Petitioner*,

v.

JOHN ASHCROFT, ATTORNEY GENERAL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

The United States concedes that there is now a square conflict between the Fourth Circuit and the Ninth and Third Circuits, but suggests that this conflict will resolve itself without this Court's intervention because the Fourth Circuit will inevitably reverse itself. That is pure speculation. It also ignores the depth and complexity of the conflict. The Second and Eighth Circuits have endorsed a middle ground between the Fourth Circuit's view that filing a naturalization application conclusively proves "permanent allegiance" and the Ninth Circuit's position that such allegiance can be acquired only by birth or naturalization. While joining the Ninth Circuit's side of the divide, the Third Circuit seems to simultaneously reserve the possibility that it may approve a slightly more moderate interpretation in limited circumstances. These conflicts will not resolve themselves, and this Court should not tolerate the current division among the circuits on a question of such fundamental importance as nationality.

Furthermore, the United States' statutory arguments consistently ignore the distinction between nationality and actual citizenship. The United States argues, for example, that it is only upon "the formal conferral of citizenship" that a person "loses his status as an alien and transfers his obligations of citizenship and allegiance." Brief in Opposition ("Opp.") at 9. That view cannot be squared with the statute, which defines the term "national of the United States" as "a person who, *though not a citizen of the United States*, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22)(B) (emphasis added).

I. THE UNITED STATES CONCEDES THE EXISTENCE OF A CIRCUIT SPLIT

The United States concedes that Petitioner has correctly identified a conflict between the instant Ninth Circuit decision and the Fourth Circuit decision in *Morin*, Opp. at 8, 10, which held that "an application for citizenship is the most compelling evidence of permanent allegiance to the United States short of citizenship itself." *United States v. Morin*, 80 F.3d 124, 126 (4th Cir. 1996). Indeed, the United States acknowledges that this conflict was recently deepened by the Third Circuit's decision in *Salim v. Ashcroft*, No. 02-2244, 2003 WL 22751083 (3d Cir. July 15, 2003). Opp. at 12. The United States argues that this conflict does not warrant review because (a) it has advised federal prosecutors that "the Fourth Circuit's approach is incorrect," and instructed them not to bring any more criminal prosecutions on the *Morin* theory and (b) given the "powerful statutory arguments" articulated by the Ninth Circuit in this case, the Fourth Circuit can be expected to "reconsider" its decision in an immigration removal case. *Id.* Those submissions are wide of the mark.

First, the criminal context in which this issue arose in *Morin* was unusual and is unlikely to recur in any event. *Morin* is important because its interpretation of 8 U.S.C. § 1101(a)(22)(B) is also binding circuit precedent in immigration removal cases like this one. The fact that the United States may have advised federal prosecutors not to bring any more criminal cases on the *Morin* theory is therefore beside the point. As the cases cited in the Petition illustrate, this conflict will continue to plague the federal courts—in the Fourth Circuit and elsewhere—even if the United States never brings another criminal case like *Morin*.

Second, the Fourth Circuit decision has been binding precedent in that circuit for seven years and has also been positively embraced by district courts throughout the nation. The United States' suggestion that the Fourth Circuit will take the issue *en banc* and reverse itself is, at this juncture, nothing more than sheer conjecture.

Regardless, the circuit split is both deeper and more complex than the United States recognizes. In *Salim*, the Third Circuit held that, "[a]lthough we have not had the occasion to decide *what a petitioner must show* to prove he 'owes permanent allegiance . . .' we now join the Court of Appeals for the Ninth Circuit in holding that *simply* filing an application for naturalization does not prove that one 'owes permanent allegiance . . . .'" 2003 WL 22751083 at *3 (emphasis added). Unlike the rigid view of the Ninth Circuit, the Third Circuit seems to leave open the possibility that various forms of evidence might be relevant on the question of "permanent allegiance." On the other hand, the Third Circuit appears to simultaneously foreclose the possibility of considering anything "less than citizenship" to show "permanent allegiance to the United States" where someone is "a citizen of another country."[1] *Id.* The ambiguities in the Third Circuit's opinion underscore the current jurisprudential chaos and the urgent need for direction from this Court.

The Second and Eighth Circuit cases suggest a middle ground between the Ninth Circuit's view that national status is purely a matter of birth or naturalization and the Fourth Circuit's holding that an application for naturalization, standing alone, is enough. *See Oliver v. INS*,

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[1] A person may have no foreign citizenship and still not be either a United States citizen or born in a United States territory. *See, e.g., Hughes v. Ashcroft*, 255 F.3d 752, 756-57 (9th Cir. 2001).

517 F.2d 426, 427-28 (2d Cir. 1975) (per curiam), *cert. denied*, 423 U.S. 1056 (1976); *Carreon-Hernandez v. Levi*, 543 F.2d 637, 637 (8th Cir. 1976), *cert. denied*, 430 U.S. 957 (1977). The United States points out that the Second and Eighth Circuits held, on the facts there presented, that "aliens who had *not* applied for naturalized citizenship lacked permanent allegiance to the United States under Section 1101 (a)(22)(B)." Opp. at 10. The Second and Eighth Circuits' reasoning was that "national" status cannot be conferred in the absence of official indicia of permanent allegiance, such as the filing of an application for naturalization. This reasoning implicitly rejects the Ninth Circuit's extreme ruling that a person can become a national only by birth or naturalization.[2] Even if the United States fails to grasp the core reasoning of these cases, a number of district courts cite both *Oliver* and *Carreon-Hernandez*, along with *Morin*, to support their finding that a pending application for naturalization can constitute evidence of "permanent allegiance."[3]

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[2] The First Circuit did not purport to consider, construe or otherwise adjudicate the scope and meaning of the term "national." To the extent that the court's passing observation in a footnote in *Iguarta De La Rosa v. United States* that "[t]he only persons currently holding the status [of nationals] are residents of American Samoa and Swains Island" can be deemed to lend support to the Ninth Circuit's holding, Petitioner submits that it only deepens the split among the Circuits. 229 F.3d 80, 86 n.12

[3] *See, e.g., Asemani v. Islamic Republic of Iran*, 266 F. Supp. 2d 24, 26-27 (D.D.C. 2003) (relying on *Hughes*, *Morin*, *Oliver* and *Carreon-Hernandez* to conclude that plaintiff had demonstrated permanent allegiance to the United States to qualify as a national where he pursued an application for citizenship and filed an oath of allegiance to the United States); *Shekoyan v. Sibley Int'l Corp.*, 217 F. Supp. 2d 59, 66-67 (D.D.C. 2002); *Lee v. Ashcroft*, 216 F. Supp. 2d 51, 57-58 (E.D.N.Y. 2002); *Shittu v. Elwood*, 204 F. Supp. 2d 876, 879 (E.D. Pa. 2002)

The United States argues as if the only issue in this case is whether an application for naturalization, standing alone, proves that the applicant owes "permanent allegiance to the United States." While this is the law in the Fourth Circuit, it is not Petitioner's sole position. Petitioner also contends that the statutory language should be taken seriously, and that although an application for naturalization may not always conclusively establish "permanent allegiance," it (along with factors like living legally in the United States for decades and raising several U.S. citizen children) is surely probative evidence entitled to some consideration. That appears to be the law in the Second and Eighth Circuits. These courts, along with the Fourth Circuit, have rejected the Ninth Circuit's blanket rule, which ignores the facts and circumstances indicating allegiance in a particular case and holds that nationality can only be attained by birth or naturalized citizenship.[4] The complexity of this conflict underscores the crucial need for this Court to

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(recognizing the split among circuits on indicia of "national status" under Section 1101(a)(22)(B)).

[4] The United States' cursory dismissal of *Johnson v. Eisentrager*, on the grounds that "there was no issue of United States nationality," misses the point—that this Court has identified the application for citizenship as a milestone for increased rights in our society in the process of acquiring the full rights of citizenship. 339 U.S. 763, 770, 70 S. Ct. 936, 94 L. Ed. 1255 (1950) (observing that "[t]he alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.").

intercede and provide a definitive resolution—and proves that these issues will not go away even if the Fourth Circuit reconsiders.

II. THE STATUTORY ARGUMENTS OF THE UNITED STATES ARE UNPERSUASIVE

The United States argues that Petitioner's interpretation is inconsistent with the history, structure and plain language of the Immigration and Nationality Act ("INA"). That is incorrect.

First, the United States contends that Petitioner's view is "contrary to the ordinary understanding . . . that a non-citizen national of the United States is a person who has been born in an outlying territorial possession of the United States." Opp. at 8. While Petitioner agrees that this group of persons has traditionally been designated as non-citizen nationals, this Court has never held that non-citizen nationals can *only be* those persons born in outlying territorial possessions. If Congress had wanted to confine the term that way, it could easily have done so. Instead, it has mandated that a "national of the United States" is "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. § 1101(a)(22)(B).

Second, the United States' statutory construction arguments repeatedly conflate the distinction expressly drawn by 8 U.S.C. § 1101(a)(22)(B) between nationality and citizenship. Many provisions within Title 8 use the terms "national" and "nationality" in a looser sense, as a synonym for "citizen" or "citizenship," and are therefore unhelpful when interpreting a statute that expressly distinguishes those concepts. For example, the United States points to 8 U.S.C. § 1101(a)(23), which defines naturalization as the "conferring of nationality of a state upon a person after birth, by any means whatsoever." The United States claims that

"[i]f naturalization applications conferred nationality, then, nonsensically, *applicants* for naturalized citizenship would acquire 'naturalization' just by applying for it, without any approval or conferral by the government." Opp. at 9. That makes sense only if you accept the premise that nationality and naturalized citizenship are the same thing. Clearly, when § 1101(a)(23) talks about the "conferring of nationality" it really means the "conferring of citizenship." That is what naturalization has always meant, and any other reading would render §1101(a)(22) self-contradictory.

Similarly, Petitioner's position is not "at odds with 8 U.S.C. 1481(a)." Opp. at 9. Section 1481 discusses "[l]oss of nationality by native-born or naturalized *citizen[s]*," and not by non-citizen nationals. 8 U.S.C. § 1481 (emphasis added). Therefore, it is another example of a provision within Title 8 that uses the terms "national" and "nationality" in a looser sense, as a synonym for "citizen" or "citizenship," rather than as more precisely defined in § 1101(a)(22)(B). This becomes further evident in reviewing cases that address loss of such "nationality" pursuant to § 1481. Such cases involve the loss of citizenship by naturalized or natural-born citizens and not loss of nationality by individuals who have attained status, by birth or otherwise, as a non-citizen national. *See, e.g., Vance v. Terrazas*, 444 U.S. 252, 100 S. Ct. 540, 62 L. Ed. 2d 461 (1980); *Action S.A. v. Marc Rich & Co., Inc.*, 951 F.2d 504 (2d Cir. 1991); *Richards v. Sec'y of State, Dep't of State*, 752 F.2d 1413 (9th Cir. 1985); *Davis v. Dist. Dir., Immigration and Naturalization Serv.*, 481 F. Supp. 1178 (D.D.C. 1979).

The United States next argues that because 8 U.S.C. § 1408 sets forth four categories of persons classified as nationals but not as citizens, all of which relate to birth in an outlying possession of the United States, it necessarily indicates that Congress intended to exclude all others from

this category. Opp. at 10. Section 1408 is specifically entitled "[n]ationals but not citizens of the United States at birth." 8 U.S.C. § 1408. By its very title, § 1408 is not meant to include those persons who attain non-citizen, national status after birth. If Congress had intended to limit the application of § 1101(a)(22)(B) to those categories set forth in § 1408, it could easily have done so expressly—and there was no need to include the phrase "owes permanent allegiance to the United States" at all. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001) (citation omitted).

Finally, the United States complains that Petitioner's interpretation of the statute creates a trap in which some aliens will not be able to be removed but can also not be naturalized. Opp. at 9 (referring to 8 U.S.C. § 1429). This is simply another example of the United States' attempt to conflate citizenship and nationality. The United States assumes that everyone who is not a citizen and cannot become one should be removable. But Congress clearly decreed otherwise, recognizing that a person "who, *though not a citizen of the United States*, owes permanent allegiance to the United States" should not be removed. 8 U.S.C. § 1101(a)(22)(B). The fact that some detainees who applied for citizenship before removal proceedings were initiated may escape removal is not "paralysis," Pet. App. 11, but exactly what Congress intended. Petitioner does not suggest that every detainee who files an application for citizenship can avoid removal on that basis alone. Rather, as the Petition makes clear, a pending application may be sufficiently compelling evidence of permanent allegiance. At any rate, a pending application is, at a minimum, *some*

relevant evidence of permanent allegiance, which should be considered along with other factors.

The United States also suggests that even if the words "owes permanent allegiance" are interpreted in accordance with their plain, ordinary meaning, the filing of a naturalization application is insufficient evidence of such allegiance because applicants have merely indicated a willingness to take the oath of allegiance and have not actually taken such oath.[5] Opp. at 8. The United States urges that it is unreasonable to infer from a willingness to take an oath that a person in fact owes allegiance to the United States. Opp. at 8-9. However, it is vastly more unreasonable to infer, as the United States and the Ninth Circuit would have it, that *none* of the persons who have indicated a willingness to swear an oath to that effect do indeed owe "permanent allegiance" to the United States. The filing of a naturalization application, which entails meeting numerous statutory criteria including lengthy residence in the United States and a written declaration, sworn under penalty of perjury, of willingness to take a public oath of allegiance, cannot be taken lightly.[6] Certainly,

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[5] The INA defines the word "permanent" as "a relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." 8 U.S.C. § 1101(a)(31). Petitioner's willingness to take the oath, therefore, does not lack permanence in the statutory sense merely because he might withdraw it or the United States might reject it.

[6] As the Petition makes clear, the INS failed to consider Petitioner's naturalization application for nearly five years. Pet. at 16, n.8.

completing such meaningful and significant steps toward citizenship is *probative evidence* of permanent allegiance.[7]

In any event, the United States' and the Ninth Circuit's suggestion that actually taking the citizenship oath is the only way to prove permanent allegiance to the United States is absurd, because it renders the statute facially self-contradictory. Section 1101(a)(22)(B) defines a national as "a person who, *though not a citizen of the United States*, owes permanent allegiance to the United States." (emphasis added). The United States' view that it is only upon "the formal conferral of citizenship" that a person "loses his status as an alien and transfers his obligations of citizenship and allegiance," Opp. at 9, is therefore blatantly inconsistent with the statute. Congress clearly recognized in § 1101(a)(22)(B) that some persons who are not citizens owe permanent allegiance to the United States and said so in unmistakable terms.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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[7] Congress has historically recognized that an individual's allegiance to the United States is demonstrated by the filing of an application for naturalization. *See, e.g., Petition of Kazuichi Tsuji*, 119 F. Supp. 68, 71 (N.D. Cal. 1953) (recognizing that the Act of May 18, 1917 made not only all male citizens, but also "male persons residing in the United States, not alien enemies, who have declared their intention to become citizens," eligible for the draft); *In re Miegel*, 272 F. 688, 697 (E.D. Mich. 1921); *Holmes v. United States*, 391 U.S. 936, 940 n.4, 88 S. Ct. 1835, 1838, 20 L. Ed. 2d 856 (1968).

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